Supreme Court, U.S.
FILED
MAY 30 1991
OFFICE OF THE CLERK

No. 90-1640

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM M. CHURCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM R. DUGAN, JR.
Col., OJAG, USAF

BRENDA J. HOLLIS
Lt. Col., OJAG, USAF

JAMES C. SINWELL
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division
Headquarters, United States Air Force
Bolling Air Force Base
Washington, D.C. 20332-6128

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction of attempted murder.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Braxton v. *United States*, No. 90-5358 (May 28, 1991)	5
Hyde v. *United States*, 225 U.S. 347 (1911)	6
United States v. *Brown*, 604 F.2d 347 (5th Cir. 1979), cert. denied, 445 U.S. 962 (1980)	5
United States v. *Bunney*, 705 F.2d 378 (10th Cir. 1983)	5
United States v. *Byrd*, 24 M.J. 286 (C.M.A. 1987)	4
United States v. *Crawford*, 837 F.2d 339 (8th Cir. 1988)	5
United States v. *Del Carmen Ramirez*, 823 F.2d 1 (1st Cir. 1987)	5
United States v. *Dworken*, 855 F.2d 12 (1st Cir. 1988)	5
United States v. *Fooladi*, 746 F.2d 1027 (5th Cir. 1984)	5
United States v. *Forbrich*, 758 F.2d 555 (11th Cir. 1985)	5
United States v. *Hyska*, 29 M.J. 122 (C.M.A. 1989)	4
United States v. *Ivic*, 700 F.2d 51 (2d Cir. 1983)	5
United States v. *Jackson*, 560 F.2d 112 (2d Cir.), cert. denied, 434 U.S. 941 (1977)	5

Cases—Continued: Page

United States v. *Manley*, 632 F.2d 978 (2d Cir. 1980), cert. denied, 449 U.S. 1112 (1981) 5
United States v. *McDowell*, 705 F.2d 426 (11th Cir. 1983) 5
United States v. *McFadden*, 739 F.2d 149 (4th Cir.), cert. denied, 469 U.S. 920 (1984) 5
United States v. *Miller*, 30 M.J. 999 (N.-M.C.M.R. 1990) 4
United States v. *Mims*, 812 F.2d 1068 (8th Cir. 1987) 5
United States v. *Mowad*, 641 F.2d 1067 (2d Cir.), cert. denied, 454 U.S. 817 (1981) 5
United States v. *Pennyman*, 889 F.2d 104 (6th Cir. 1989) 5
United States v. *Presto*, 24 M.J. 350 (C.M.A. 1987) 4
United States v. *Prichard*, 781 F.2d 179 (10th Cir. 1986) 5
United States v. *Rios*, 32 M.J. 501 (A.C.M.R. 1990) 4
United States v. *Rovetuso*, 768 F.2d 809 (7th Cir. 1985), cert. denied, 474 U.S. 1076 (1986) 5
United States v. *Savaiano*, 843 F.2d 1280 (10th Cir. 1988) 5
United States v. *Schramm*, 715 F.2d. 1253 (7th Cir. 1983), cert. denied, 466 U.S. 930 (1984) 5
Wainwright v. *Goode*, 464 U.S. 78 (1983) 5

Statutes:

Uniform Code of Military Justice, Art. 80, 10 U.S.C. 880 ..... 2, 4, 6
18 U.S.C. 794(a) 5
18 U.S.C. 844(i) 5
18 U.S.C. 1512(a) 5
18 U.S.C. 1951 5
18 U.S.C. 2113(a) 5
21 U.S.C. 846 5

Miscellaneous:

	Page
Manual for Courts-Martial, United States – 1984 ...	4, 6
Model Penal Code (1962)	4

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1640

WILLIAM M. CHURCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Air Force Court of Military Review (Pet. App. 12a-32a) is reported at 29 M.J. 679. The opinion of the Court of Military Appeals (Pet. App. 1a-11a) is reported at 32 M.J. 70.

JURISDICTION

The judgment of the Court of Military Appeals was entered on January 28, 1991. The petition for a writ of certiorari was filed on April 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Grand Forks Air Force Base in North Dakota, petitioner, a member of the

United States Air Force, was convicted of the attempted murder of his wife, in violation of Article 80 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880. Petitioner was sentenced to confinement for 10 years, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction to the lowest enlisted rank. The Air Force Court of Military Review affirmed the findings and the sentence. On discretionary review, the Court of Military Appeals affirmed.

1. Petitioner and his wife experienced marital difficulties that led to their separation in 1987. Pet. App. 15a. Beginning in late 1987, petitioner said that he wanted to have his wife killed, and he asked several friends to find someone who would do the job for him. Tr. 145, 182.1, 193-195, 210-216, 273. Petitioner attempted to contact persons who he thought might be willing to kill his wife, and petitioner was present when one of his co-workers made a telephone call to a person in New York City on petitioner's behalf for that purpose. Pet. App. 16a; Tr. 211-212, 215-216. When petitioner began to outline to two co-workers the specific details as to how the killing could be accomplished, the co-workers contacted agents of the Air Force Office of Special Investigations (OSI). Pet. App. 17a; Tr. 196. The OSI began an investigation and placed an undercover OSI agent in the role of a hired killer. Pet. App. 17a; Tr. 159. Petitioner was then introduced to the undercover agent, who represented himself to be a "hit man" from New York by the name of "Nick." Pet. App. 17a; Tr. 162, 262.

Nick agreed to murder petitioner's wife for $2,100. Pet. App. 18a; Tr. 222, 273, 285. Petitioner agreed to pay Nick $1,100 at their first meeting and the remainder after the job was done. Pet. App. 18a; Tr. 284-285; PXs 9-10. Petitioner gave Nick a picture of his wife, her military dependent identification card, a road map of the area in Michigan where she lived, an outline of the layout of her house, and a list of occupants including their descriptions and normal

routines. Pet. App. 18a; Tr. 274-277; PXs 16, 19, 20a-f, 21-22a. Petitioner and Nick planned the details of the murder; petitioner suggested that Nick use a gun or a knife. Pet. App. 19a; Tr. 285-286. Nick showed petitioner a .22 caliber semi-automatic pistol equipped with a silencer, and petitioner gave his approval to use that gun as the murder weapon. Tr. 285; PX 23. Petitioner told Nick that if his wife's grandfather was home he should "take care of him too." Pet. App. 19a; Tr. 287. To pay Nick for murdering his wife, petitioner borrowed $600 from two airmen. Tr. 153, 218-220. Petitioner instructed Nick to kill his wife on Monday, April 24, 1988. Petitioner said that he would make himself visible at work that day, so that he would have an alibi. Pet. App. 19a; Tr. 288.

On April 24, the planned date of the murder, Nick called petitioner and told him his wife had moved and that it would cost him an extra $500 to locate her. Petitioner agreed to pay the extra money. Petitioner had one of his co-workers call directory assistance to get his wife's new telephone number. Pet. App. 19a; Tr. 290. On the following day, April 25, Nick telephoned petitioner and told him that he had found petitioner's wife and he would kill her sometime before the next morning. Petitioner approved the plan and told Nick that he already had another $1,000 and that he would get the additional $500. Pet. App. 8a, 19a; Tr. 290.

On April 26, petitioner was notified through his squadron that his wife had been murdered during an apparent robbery. Petitioner told a co-worker everyone was very sympathetic and that he had put on "a class A act." Pet. App. 8a, 20a; Tr. 223-224, 290, 293. Petitioner and Nick met later on April 26. Petitioner complimented Nick for doing "good work," and Nick showed petitioner a photograph purporting to be the dead body of petitioner's wife with a bullet hole in her head and neck. Petitioner gave Nick the final payment for the murder, after which OSI agents arrested petitioner. Pet. App. 8a, 20a; Tr. 292-294.

2. On appeal to the Air Force Court of Military Review, petitioner challenged the sufficiency of the evidence to show attempted murder. After conducting an extensive review of the evidence presented at trial, the court of military review upheld the conviction. Pet. App. 12a-32a.

3. The Court of Military Appeals granted discretionary review and affirmed. Pet. App. 1a-11a.

ARGUMENT

Article 80 of the UCMJ, 10 U.S.C. 880, and Part IV, Para. 4b of the *Manual for Courts-Martial, United States—1984* make it an offense to attempt to commit another violation of the Code.[1] The question in this case involves the proper interpretation of those provisions. Petitioner argues that the evidence was insufficient to support his conviction for attempted murder.

1. In determining whether particular conduct constitutes an attempt under Article 80, the military courts have looked for guidance to the standard found in the Model Penal Code § 5.01 (1962), which requires that the defendant take a "substantial step" toward the commission of the intended offense.[2] Although there is no general federal attempt statute, the federal courts of appeals have also applied the "substantial step" test in connection with various laws

---

[1] Article 80 of the UCMJ, 10 U.S.C. 880, defines the offense of attempt as:

> An act done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

[2] See *United States* v. *Hyska*, 29 M.J. 122, 124 (C.M.A. 1989); *United States* v. *Presto*, 24 M.J. 350, 352 (C.M.A. 1987); *United States* v. *Byrd*, 24 M.J. 286, 290 (C.M.A. 1987) (opinion of Everett, C.J.); *United States* v. *Rios*, 32 M.J. 501, 502 (A.C.M.R. 1990); *United States* v. *Miller*, 30 M.J. 999, 1001 (N.-M.C.M.R. 1990).

that contain a specific attempt offense.[3] Petitioner concedes as much. Pet. 8. See also *Braxton* v. *United States*, No. 90-5358 (May 28, 1991), slip op. 5.

Petitioner claims that the decision below conflicts with the decisions of several state courts interpreting state law. Pet. 8-9. State courts are the ultimate arbiters of state law, however, and their interpretations of state law are binding on the federal courts. See, *e.g.*, *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983). Thus, a disagreement between the state courts and the federal courts over the proper interpretation of state law issues does not warrant review by this Court.

---

[3] See, *e.g.*, *United States* v. *Pennyman*, 889 F.2d 104, 106 (6th Cir. 1989) (21 U.S.C. 846); *United States* v. *Dworken*, 855 F.2d 12, 16-23 (1st Cir. 1988) (21 U.S.C. 846); *United States* v. *Savaiano*, 843 F.2d 1280, 1296-1297 (10th Cir. 1988) (21 U.S.C. 846); *United States* v. *Crawford*, 837 F.2d 339, 340 (8th Cir. 1988) (18 U.S.C. 2113(a)); *United States* v. *Del Carmen Ramirez*, 823 F.2d 1, 2 (1st Cir. 1987) (18 U.S.C. 1951); *United States* v. *Mims*, 812 F.2d 1068, 1077 (8th Cir. 1987) (21 U.S.C. 846); *United States* v. *Prichard*, 781 F.2d 179, 181-182 (10th Cir. 1986) (18 U.S.C. 2113(a)); *United States* v. *Rovetuso*, 768 F.2d 809, 821 (7th Cir. 1985) (18 U.S.C. 1512(a)), cert. denied, 474 U.S. 1076 (1986); *United States* v. *Forbrich*, 758 F.2d 555, 557 (11th Cir. 1985) (18 U.S.C. 794(a)); *United States* v. *Fooladi*, 746 F.2d 1027, 1032-1033 (5th Cir. 1984) (21 U.S.C. 846); *United States* v. *McFadden*, 739 F.2d 149, 151-152 (4th Cir.) (18 U.S.C. 2113(a)), cert. denied, 469 U.S. 920 (1984); *United States* v. *Schramm*, 715 F.2d 1253, 1254-1255 (7th Cir. 1983) (18 U.S.C. 2113(a)), cert. denied, 466 U.S. 930 (1984); *United States* v. *McDowell*, 705 F.2d 426, 427-428 (11th Cir. 1983) (21 U.S.C. 846); *United States* v. *Bunney*, 705 F.2d 378, 381 (10th Cir. 1983) (18 U.S.C. 844(i)); *United States* v. *Mowad*, 641 F.2d 1067, 1073 (2d Cir.) (22 U.S.C. 2778(c)), cert. denied, 454 U.S. 817 (1981); *United States* v. *Manley*, 632 F.2d 978, 987 (2d Cir. 1980) (21 U.S.C. 846), cert. denied, 449 U.S. 1112 (1981); *United States* v. *Brown*, 604 F.2d 347, 350 (5th Cir. 1979) (18 U.S.C. 844(i)), cert. denied, 445 U.S. 962 (1980); *United States* v. *Jackson*, 560 F.2d 112, 116 (2d Cir.) (18 U.S.C. 2113(a)), cert. denied, 434 U.S. 941 (1977). See generally *United States* v. *Ivic*, 700 F.2d 51, 66 (2d Cir. 1983) ("It is difficult as a conceptual matter to do better than the Model Penal Code's statement.").

2. Petitioner maintains that because "Nick," the ersatz hired killer was, in fact, an OSI agent, petitioner's conduct did not constitute an attempt, since there was never a "dangerous proximity to success" that the murder of his wife would actually occur. *Hyde* v. *United States*, 225 U.S. 347, 387-388 (1911) (Holmes, J., dissenting). Pet. 8. Military law, however, does not recognize the defense of factual impossibility. *Manual* Pt. IV, Para. 4c(3).[4] Under the circumstances, the fact that "Nick" was an OSI agent and not a contract killer does not exculpate petitioner for attempting to bring about his wife's murder.

---

[4] *Manual* Pt. IV, Para. 4c(3) provides that:

> A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt. For example, if A, without justification or excuse and with intent to kill B, points a gun at B and pulls the trigger, A is guilty of attempt to murder, even though, unknown to A, the gun is defective and will not fire. Similarly, a person who reaches into the pocket of another with the intent to steal that person's billfold is guilty of an attempt to commit larceny, even though the pocket is empty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

WILLIAM R. DUGAN, JR.
Col., OJAG, USAF

BRENDA J. HOLLIS
Lt. Col., OJAG, USAF

JAMES C. SINWELL
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division

MAY 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991 — 282-061/20568